

Alternative Protocol B

Preface

Protocol B is designed to address the following issues that are presented by the Stockhammer and Bishop-Fuller models:

Under the Stockhammer model, records are disclosed to the defense counsel when a Lampron showing has been made. However, satisfaction of the requirements of Lampron is not a guarantee that the produced records will, in fact, be relevant to an issue in the case. Because the records themselves are not screened before being disclosed to the defendant under the Stockhammer model, privileges established by statute will be set aside and irrelevant privileged information disclosed without any concomitant benefit to the defendant.

The advantage of the Stockhammer model is that the records are reviewed by an advocate whose knowledge of the case is superior to that of a reviewing judge and who is therefore better able to determine whether information in the records is relevant to the defense. Protocol B addresses concerns about the reviewing judges' ability to make an informed decision by providing for a record review hearing at which the judge reviewing the records will have access to grand jury minutes, police reports and the Lampron showing and the ability to obtain additional information from either or both of the lawyers as (s)he reviews the records. As under Bishop, the judge's role is to identify relevant materials, "a task and term with which every judge is familiar." Commonwealth v. Bishop, 416 Mass. 169, 180 (1993).

Historically, the Bishop-Fuller model has generated significant pretrial delays. Protocol B addresses the issue of delay by establishing deadlines for the filing of motions and hearings and procedures to ensure timely compliance with orders for production. It also promotes timely

review of the records and disclosure of relevant information by making the judicial review of records a scheduled event during the court day. Finally, it eliminates the time-consuming requirement that the reviewing judge segregate privileged from non-privileged records. The judge is required to make a determination at the hearing that at least some of the records are privileged and identify the privilege. If that determination is made, the judge reviews the records and grants counsel access to relevant information. Under Protocol B, irrelevant non-privileged information that would have been produced under both Stockhammer and Bishop-Fuller will not be produced. A defendant who is deprived of access to irrelevant information suffers no prejudice.

Protocol B attempts to focus judicial efforts on ensuring the timely disclosure of relevant information, whether privileged or not, and the protection from disclosure of privileged information that is not relevant to any issue in the case.

Protocol¹

Documents, books, papers or other objects [hereinafter "records"] held by third parties may be obtained prior to trial by defendants in criminal cases subject to the following procedures.

Comment: *Mass. R. Crim. P. 17(a)(2)*, governs pretrial production of “books, papers, documents or other objects.” In addition, *Rule 14(a)(2)*, as amended in 2004, 442 Mass. 1518 (2004), permits discretionary discovery of material and relevant evidence not in possession of the prosecutor. See *Jansen, Petitioner*, 442 Mass. 117 n. 11 (2005).

1. Motion For Order to Produce Records

a) The defendant must file and, except as provided in subsection d, serve upon the Commonwealth a motion for issuance of an order to a third party for the production of records. The motion must be accompanied by an affidavit that complies with the requirements set forth in *Commonwealth v. Lampron*, 441 Mass. 265 (2004), as modified from time to time by the Supreme Judicial Court.

b) The Commonwealth shall file its response to the motion at least seven days before the scheduled hearing.

c) Upon receipt of the motion, the Court shall schedule a hearing to be held within thirty days from the day the motion was filed.

d) Before filing a motion for production of records, the defendant may file a motion, supported by affidavit, requesting permission to file these pleadings *ex parte* on the grounds that there is a reasonable likelihood that if permission were not granted, the Commonwealth would be furnished with information incriminating to the defendant to which it would otherwise not be

¹This protocol does not address motions for production of third-party records filed by the Commonwealth. See *Commonwealth v. Mitchell*, 444 Mass. 786, —, n. 17 (2005).

entitled or that notice to a third party could result in destruction or alteration of the requested documents. The court shall conduct a hearing on the motion on the record. In the usual case, the Commonwealth shall be present for the hearing on the motion.

Upon good cause shown, the court shall order that the motion to proceed ex parte and supporting affidavit be impounded by the clerk of the court.

Comment:

The Lampron Requirements

The motion must identify the name and address of the record holder and describe with particularity the records sought. The request should be limited to the time frame relevant to the allegations and to the defense of the case. The motion must be accompanied by an affidavit that describes with specificity the relevance of the requested documents. Notwithstanding the provisions of Rule 13(a)(2), the affidavit may contain reliable hearsay provided that the source of the hearsay is identified in some manner. Lampron, 441 Mass. at 270-271. Compare Commonwealth v. Bushway, 442 Mass. 1035, 1036 (2004) (rescript). The motion and affidavit must show (i) that the contents of the records sought will have a rational tendency to prove or disprove an issue in the case, (ii) that the records sought are not otherwise procurable in advance of trial, (iii) that failure to produce the records prior to trial may result in an unreasonable delay during the course of trial, and (iv) that the request is made in good faith. Lampron, 441 Mass. at 269-270.

Time for Filing

Mass. R. Crim. P. 13(d)(1) directs: "Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown." A Lampron motion pursuant to Rule 14 is a discovery motion. Accordingly, absent good cause, it must be filed by the end of the pretrial hearing. See Mass. R. Crim. P. 14(a)(2).

A Lampron motion pursuant to Rule 17 is not a discovery motion, see Jansen, 444 Mass. at 117, n. 11. Mass. R. Crim. P. 13(d)(2) provides: "A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause."

Scheduling the Hearing

Scheduling the hearing as soon as the motion is filed will help to assure that the witness receives adequate notice of the date of the hearing, that defendant's trial preparation is not unduly delayed and that production and review of the records and hearings relating to disclosure of the records, if required, can be accomplished within the dates established by the applicable tracking

order. Where feasible, the hearing shall be held on the same date as any discovery compliance hearing scheduled pursuant to Rule 11(c).

Ex Parte Motions

Subpart d comports with the Court's holding in Commonwealth v. Mitchell, SJC No. 09472 (July 29, 2005), authorizing a defendant to proceed ex parte in the rare case in which the circumstances described are present.

Impoundment

The public's right of access to judicial records may be restricted only on a showing of good cause. The Republican Company v. Appeals Court, 442 Mass. 218, 223 (2004).

2. Notice to Witness

The Court shall issue a notice to the witness which shall advise the witness that a motion for the production of records has been filed and that a hearing has been scheduled. The notice shall provide a form for the witness to assert or waive any privilege, together with instructions for filing. Unless the court orders otherwise, the Commonwealth shall transmit the notice to the witness. Failure by the witness to file the form, standing alone, shall not be deemed a waiver of the privilege.

Comment:

Victim's Right to Confer

Subpart B comports with G.L. c. 258B, §3 (g) which gives victims, as defined in section 1 of that chapter, the right "to confer with the prosecutor . . . before any hearing on motions by the defense to obtain psychiatric or other confidential records."

3. Hearing on Motion for Production of Records and Order for Production

a) The court shall conduct a hearing on the defendant's motion. If the court finds that the defendant has satisfied the requirements for issuance of an order requiring production of records,

the court shall issue an order to the third party requiring production of specified records within fourteen days.

b) The order shall be accompanied by the Notice and Instructions to Record Holders and a copy of any assertion or waiver of privilege that has been filed and shall direct the record holder

i. to file the records described in the order in the Clerk's Office under seal in an envelope marked with the name of the record holder and the case name and docket number on or before a specified date (the "return date"); and

ii. to assert any privilege by filing an affidavit with the records that identifies the type of records and the privilege or privileges claimed, and the name, profession and license number and/or qualifications of any person whose participation in creating the records gives rise to the claim of privilege.

c) If the record holder believes that the summons is being used to subvert Rule 14 or if compliance with the order would be oppressive or unreasonable, the record holder must file a motion to modify or vacate the order or to extend the time for production, supported by affidavit, on or before the return date.

d) If records covered by the subpoena that are not privileged can be segregated without undue burden, the record keeper shall segregate such records and file them under seal in a separate envelope marked "Not Privileged," with the name of the record holder and the name and docket number of the case.

Comment:

Mass. R. Crim. P. 17(a)(2) permits a nonparty to challenge a subpoena “if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of Rule 14.”

4. The Return Date

a) The case shall be placed on an administrative list for determination whether the records have been received in the Clerk’s Office on the day after the return day.

b) Copies of any records produced in response to the order as to which no claim of privilege is made shall be made available to counsel for the parties immediately.

c) If a motion to vacate or modify the order has been filed, a hearing will be held with notice to the record holder, the Commonwealth, defendant and the witness.

d) If the records have not been produced and no motion to vacate or modify the order or to extend the time for production has been filed, an order to show cause will issue scheduling a contempt hearing in seven days.

5. Record Review Hearing

If a privilege is claimed, a “record review hearing” will be scheduled for the purpose of determining whether any privilege applies to the records produced in response to the order and, if so, whether such records are relevant. The court will first make findings on the record that at least some of the records are in fact privileged, specifying the statute or other provision giving rise to the privilege, and that the privilege holder is asserting the privilege. In addition to the affidavits submitted in support of the assertion of a privilege, the court may review the records in making this

determination. If the court finds that no privilege has been established, the court shall order that counsel for the Commonwealth and the defendant be given access to the documents.

The court may, but is not required to, segregate nonprivileged records in a marked envelope.. The Commonwealth and the defendant shall be given access to any records so segregated.

If the court finds that at least some of the records contain privileged information, the court shall review the records in camera to determine whether any of them are relevant. The standard to be applied is evidentiary relevance, that is, whether the document in question has “a rational tendency to prove or disprove an issue in the case.” Liacos, Brodin & Avery, *Massachusetts Evidence*, §4.1.1 at 108 (7th ed. 1999). Attorneys shall attend the hearing. To facilitate the court’s determination of relevance, the following materials shall be available at the hearing: (1) the Lampron showing; (2) police reports and grand jury minutes; (3) any statement of the case filed by the prosecution; and 4) any additional written proffer the defendant wishes to make (the defendant may file a motion to submit additional information as to the relevance of the records *ex parte* if such information would tend to incriminate the defendant, see *Commonwealth v. Mitchell*, *supra*.).

Documents determined to be relevant shall be segregated and placed in a marked sealed envelope.² Defense counsel and the Commonwealth shall have access to documents found to be relevant subject to a protective order. Documents that are found not to be relevant shall be placed in a sealed envelope so marked and preserved as set forth in section 7 of this protocol.

² Thus, under this protocol, irrelevant non-privileged information that would have been produced under both Stockhammer and Bishop-Fuller would not be produced, contrary to the Court’s decisions in Commonwealth v. Oliveira, 438 Mass. 325, 338 (2002) and Commonwealth v. Pare, 427 Mass. 427, 430 (1998).

6. Motions to Disclose or Use Records

After receiving access to any records at or after the record review hearing, either party may file a motion or motions to disclose and/or use records, or portions thereof, on the grounds a) that they are not privileged or confidential; or b) if privileged or confidential, such disclosure and/or use is required to provide a fair trial. The moving party bears the burden of making this showing. The motion must be in writing, and served on the non-moving party. The Court shall hold a hearing on the record and shall make finding and rulings. The court may set terms and conditions of disclosure and use. If the motion to disclose and/or use such records at trial is allowed, the nonmoving party may file a motion to use or disclose additional portions of the records. Pre-trial motions to use and/or disclose may be renewed at trial. Upon good cause shown, the motion and any supporting and opposing papers shall be impounded.

Comment:

Defense counsel or the Commonwealth may seek to disclose information from third party records to investigators, experts, or other persons, including the defendant, to assist in trial preparation. See Commonwealth v. Bishop, 416 Mass. 169, 182 (1993)

Section 6 also addresses the Court's obligation to revisit the issue of relevance during trial. Information deemed immaterial upon original examination "may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.'" Bishop, 416 Mass. at 183, quoting Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

7. Preservation of Records

Any records produced pursuant to an order issued under this rule shall be preserved in the Clerk's Office for appellate review.

8. Judicial Discretion

It is understood that specific situations may arise from time to time which require some variation from the time limits and procedures set forth above. In the interest of justice, judges may exercise their sound discretion to extend the time periods and otherwise alter the procedures set forth herein.